80-55

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 80-55

THOMAS J. MASTRANGELO,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On appeal from the Supreme Court
of Pennsylvania

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE
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NO. 80-55

THOMAS J. MASTRANGELO,
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vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

MOTION TO DISMISS OR AFFIRM

On appeal from the Supreme Court of Pennsylvania

.....

Pursuant to United States Supreme Court Rule 16, appellee, the Commonwealth of Pennsylvania, hereby moves this Court to dismiss this appeal on the ground that

it does not present a substantial federal question, or, in the alternative, to affirm the decision of the Court of Appeal of the Commonwealth of Pennsylvania on the ground that the question presented is so insubstantial as not to warrant consideration by this Court.

STATEMENT OF THE CASE

The opinion of the Pennsylvania Supreme Court attached to the Jurisdictional Statement as Appendix, adequately sets forth the factual and procedural matters which have transpired.

STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States.

This case also involved the Pennsylvania Crimes Code section 5503 which states:

> (a) Offense defined. - A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance and alarm, or recklessly creating a risk thereof, he:
>
> (2) makes unreasonable noise.*

This case also involves Pennsylvania Crimes Code section 5101 which states:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section

---

*This section closely follows the Model Penal Code, §250.1 [Tentative Draft No. 13 (1961)]

> does not apply to flight by a person charged with a crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

QUESTIONS PRESENTED

i. DID THE PENNSYLVANIA SUPREME COURT USE AN APPROPRIATE STANDARD IN DETERMINING THAT THE STATE'S DISORDERLY CONDUCT STATUTE WAS CONSTITUTIONAL ON ITS FACT?

ii. DID THE PENNSYLVANIA SUPREME COURT'S CONSTRUCTION OF THE STATE'S DISORDERLY CONDUCT STATUTE ALLEVIATE IT OF POSSIBLE DUE PROCESS CHALLENGES FOR VAGUENESS?

iii. DID THE PENNSYLVANIA SUPREME COURT PROPERLY HOLD THAT "UNREASONABLE NOISE" WAS NOT CONSTITUTIONALLY VAGUE, ESPECIALLY IN LIGHT OF PRIOR APPELLATE DECISIONS IN THAT STATE?

iv. DID THE PENNSYLVANIA SUPREME COURT PROPERLY UPHOLD THE APPELLANT'S CONVICTION FOR OBSTRUCTING THE ADMINISTRATION OF JUSTICE OR OTHER FUNCTION?

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

(i)

THE PENNSYLVANIA SUPREME COURT USED THE APPROPRIATE STANDARD IN DETERMINING THAT THE STATE'S DISORDERLY CONDUCT STATUTE WAS CONSTITUTIONAL ON ITS FACE.

The appellant first alleges that the Pennsylvania Supreme Court erred in failing to use the proper standard to determine whether the state's disorderly conduct statute chills Constitutional rights on its face. The body of the Jurisdictional Statement, however, not only fails to mention with any specificity the manner in which the opinion below was wanting, but is makes no reference to that court, to its opinion, or to the standard(s) by which he feels the statute should have appropriately been measured. The Statement instead criticizes this Court's alleged erosion of the "void-for-

vagueness" doctrine by reason of its decision in Colten v. Kentucky, 407 U.S. 104 (1972).

A reading of the decision of the Pennsylvania Supreme Court shows that the appellant's actions were evaluated in a manner consistent with the Colten case. The court first examined the disorderly conduct statute for overbreadth or vagueness and then examined the defendant's conduct in light of its construction of the law.

The Pennsylvania Supreme Court limited the construction to be given the statute by stating,

> "We believe a man of common intelligence would understand what is and what is not made criminal under this statute, especially after we now make clear that the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right.

> By so limiting this statute, appellant's facial attack concerning the vagueness of the disorderly conduct statute must fail. (Citation omitted)."

Com. v. Mastrangelo, ____ Pa. ____, ____, 414 A.2d 54, 58 (1980).

The foregoing standard bears a remarkable similarity to the language of the Court of Appeals of Kentucky which was upheld by this Court.

> "We believe that citizens who desire to obey the statute will have no difficulty in understanding it, relying, as they are entitled to, that the statute will be construed sensibly and reasonably. It is true that the statute will be construed sensibly and reasonably. It is true that the statute does not attain idealistic perfection in preciseness, but it is fully as precise as some of the language in the Bill of Rights."

Colten v. Commonwealth, 467 S.W. 2d 374, 378 (Ky.Cl.App. 1971). See also Colten v. Kentucky, 407 U.S. at 110, 92 S. Ct. at 1957, 32 L. Ed. 2d at 590.

The Pennsylvania Supreme Court, as did the Colten court, next examined the appellant's conduct in light of its construction of the disorderly conduct statute. It had no difficulty in characterizing the appellant's conduct as unprotected "fighting words", referring to the oft cited definition of the same from Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and then holding,

> "It is clear in the instant case that appellant was not exercising any constitutionally protected right; rather, in a loud, boisterous and disorderly fashion, he hurled epithets at the meter maid which we believe fit the Chaplinsky definition of fighting words. Even under our narrow construction of the disorderly conduct statute, we can find no merit in appellant's argument that the statute was invalid as applied to him."

Com. v. Mastrangelo, ____ Pa. ____, ____, 414 A.2d 54, 58 (1980).

THE PENNSYLVANIA SUPREME COURT'S CONSTRUCTION OF THE STATE'S DISORDERLY CONDUCT STATUTE ALLEVIATED IT OF POSSIBLE DUE PROCESS CHALLENGES FOR VAGUENESS.

The appellant next alleges that even if the Pennsylvania Supreme Court employed the proper criteria in testing the disorderly conduct statute's constitutionality, its decision did not alleviate the statute of its unconstitutional vagueness. The thrust of the appellant's argument here is that the decision of the Pennsylvania court "did not distinguish the point at which a citizen's intent to exercise free speech must give way to the public's need for order and freedom of (sic from) inconvenience. A citizen thus has no way of determining at what point he may be found to be recklessly creating a public inconvenience." [1] Jurisdictional Statement, p. 29.

In a per curiam rejection of a due process challenge for vagueness to the Tennessee statute making criminal "crimes against nature", Tenn. Code Ann. §39-707, this Court said,

> "It is well settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 2d 179 (1954); see Wainwright v. Stone, 414 U.S. 21, 22, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "(i)n most English words and phrases there lurk uncertainties," Robinson v. United States, 324 U.S. 282, 286, 65 S. Ct. 666, 668 89 L. Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any

> certainty what some statute may compel or forbid. C.P. Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232 (1913); United States v. National Dairy Corp., 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963). All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."

Rose v. Locke, 423 U.S. 48, 49-50, 96 S.Ct. 243,244, 46 L.Ed. 2d 185, 188 (1975).

Moreover, the Colten Court made it clear that the vagueness doctrine dealt with a "rough idea of fairness". 407 U.S. at 590, 92 S. Ct. at 1957, 32 L. Ed. 2d at 590. "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Connally v. General Construction Co., 1926, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322." Jordan v. DeGeorge, 341 U.S.

223, 231-232, 71 S. Ct. 703, 708, 95 L. Ed. 886 (1951). (See opinion of court below citing Connally v. General Construction Co., at ____ Pa. at ____, 414 A.2d at 56). Vagueness "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited". 407 U.S. at 110, 92 S. Ct. at ____, 32 L. Ed. 2d at 590. Even since Colten the Court has recognized,

> "There are areas of human conduct where, by the vary nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official

> duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order. Cf. Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)."

Smith v. Goguen, 415 U.S. 566, 581, 94 S. Ct. 1242, 1251, 39 L. Ed. 2d 605, 616 (1974).

(iii)

THE PENNSYLVANIA SUPREME COURT PROPERLY HELD THAT "UNREASONABLE NOISE" WAS NOT UNCONSTITUTIONALLY VAGUE ESPECIALLY IN LIGHT OF PRIOR APPELLATE DECISIONS IN THAT STATE.

The appellant next alleges that the Pennsylvania disorderly conduct statute is constitutionally infirm in proscribing "unreasonable noise", since that provides no "sufficiently ascertainable standard by which to adjudge conduct criminal and also permits police officers too wide a latitude to be constitutionally

permissible". Jurisdictional Statement, p. 32. In short, the appellant believes the standard of "unreasonable noise" to be so vague in itself as to violate due process.[2.]

The Pennsylvania Supreme Court placed a construction on the challenged words. Not only were these words interpreted so they "could not be used to punish anyone exercising a protected First Amendment Right," ____ Pa. at ____, 414 A.2d at 58, but they were also interpreted in terms of the disorderly conduct statute's predecessor act.[3.]

In construing the predecessor disorderly conduct statute the Pennsylvania Supreme Court found "unseemly noise" to be that which is "not fitting or proper in respect to the conventional standards of organized society or a legally con-

stituted community". Com. v. Greene, 410 Pa. 111, 113, 189 A.2d 141, 143 (1963); Com. v. Weiner, 230 Pa. Super. 245, 249, 326 A.2d 896 (1974). The court below equated "unreasonable noise" with "unseemly noise" and held this to be a sufficently specific guideline in light of the foregoing argument (ii).

"Unreasonable" has, in fact been held to be a sufficiently specific criterion by this Court on prior occasions. In Nash v. United States, 229 U.S. 373 (1913) the Court speaking through Mr. Justice Holmes, held "unreasonable restraint of trade" under the Sherman Act[4]. to be a sufficient guideline.

> "(The) law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If he is wrong, not only may he incur a fine or a

> short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it" by common experience in the circumstances known to the actor ... "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct. (Citations omitted.)"

229 U.S. at 377, 233 S. Ct. at 781, 57 L. Ed. at 1235. See also Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 52 S. Ct. 103, 76 L. Ed. 136 (1931), upholding a state statute authorizing the state attorney general to seek civil remedies against petroleum companies for their "unreasonable waste of natural gas."

It is also submitted that the cases relied upon by the appellant in support of his proposition that "unreasonable noise" is unconstitutionally vague do not

control the instant case. All of the cases except Marks v. City of Anchorage, 500 P. 2d 644 (Alaska 1972) and Poole v. State, 524 P. 2d 286 (Alaska 1974) were decided before the Court's decision in Colten. Marks was decided a mere eleven days after the Colten decision, and the court made no mention of that case until it denied Rehearing. Several of the cases cited upheld vagueness challenges to ordinances or statutes where the respective state's highest courts had placed no limiting construction on the challenged laws. Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); and Gardner v. Ceci, 312 F.

Supp. 516 (E.D. Wis. 1970); Original Fayette County Civic and Welfare League Inc. v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1970). In Pritikin v. Thurman, 311 F. Supp. 1400 (S.D. Fla. 1970) and Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 S. Ed. 2d 284 (1971) the courts struck down, respectively, a Florida ordinance and a California statute not so much because of those laws' proscriptions against "loud noise" and "unusual noise" but because of vagueness in other proscribed areas which had not been remedied by the courts' construction of the laws.

In Pritikin the court said,

> "The Florida state courts have given Constitutional approval to disorderly conduct and breach of the peace ordinances which prohibit making or causing to be made loud, unusual and offensive noises and disturbances, (Citations omitted) and which prohibit profane language and loud and

> disturbing and obnoxious noises. (Citations omitted). Those decisions, however, do not narrow the remaining language of this ordinance so as to sustain its constitutionality. (Emphasis added). 311 F. Supp. at 1402."

The remaining language which offended that court included "offensive conduct" and "offensive carriage".

In Cohen the Court found fault with the overbreadth of California Penal Code §415 which prohibited "maliciously and willfully disturbing the peace or quiet of any neighborhood or person... by ... offensive conduct....". Besides noting the failure of the statute to consider the intent of the actor (see endnote 1 p. 26), it is noted that additional subsections of the questioned statute were looked upon favorably by the Court. See 403 U.S. at 22 n.4, 91 S. Ct. at 1786 n. 4, 29 L. Ed. 2d at 292 n. 4.

In Marks v. City of Anchorage the Alaskan Supreme Court struck down the city's disorderly conduct statute which read, in part,

> "It shall be unlawful for any person with purpose and intent to cause public inconvenience, annoyance and alarm, or recklessly create a risk thereof by: ... (2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or addressing abusive language to any person present... "

Ordinance 17-70, §1, codified as §15-1 (mm), Anchorage Code of Ordinances (1970). It is respectfully submitted that the Alaskan Supreme Court erred in holding the ordinances prefatory language relating to intent to be unconstitutional. The same language was upheld in Colten. But it is noted that the action reached the Alaskan court by way of a class action seeking to have the

ordinance declared unconstitutional. The city filed no brief with the court and made no attempt whatsoever to introduce any construction of the ordinance by the court. The court declined to place a construction on the ordinance and found it to be unconstitutionally vague on its face. Marks is, thus, distinguishable from the instant case which placed a limiting construction on the Pennsylvania statute.

The Court of Appeals of Oregon has upheld the same provision of its disorderly conduct statute for which appeal is sought herein. In State v. Marker, 536 P.2d 1273 (Or. App. 1975) the court said "unreasonable noise" was a sufficiently specific standard to satisfy the requirements of a penal statute.

When speech is involved it can be

> "classified prohibited noise only if there is a clear and present danger of violence or if the communication is not constitutionally protected speech but merely a guise to disturb persons. 536 P.2d at 1277."

Clearly, "unreasonable noise" is an adequate standard which gives fair notice of proscribed conduct and clearly, the appellant's conduct cannot be considered as protected.

(iv)

THE PENNSYLVANIA SUPREME COURT PROPERLY UPHELD THE APPELLANT'S CONVICTION FOR OBSTRUCTING THE ADMINISTRATION OF JUSTICE OR OTHER FUNCTION SINCE THAT OFFENSE WAS BASED UPON A VALID CONVICTION UNDER A CONSTITUTIONAL DISORDERLY CONDUCT STATUTE.

The appellant last alleges that his conviction for Obstructing the administration of justice or other function, 18 C. P.S.A. §5101, cannot stand if he is con-

victed of disorderly conduct under an unconstitutional statute. The Commonwealth of Pennsylvania concedes that the conviction for "obstructing" cannot stand in the present case without the conviction for disorderly conduct since the Pennsylvania court concluded,

> "Instantly, appellant, through a course of disorderly conduct, intentionally obstructed a meter maid from carrying out her lawful duties and was thus properly convicted by more than sufficient evidence."

____ Pa. at ____, 414 A.2d 60.

It is by no means conceded, however, that the conviction for disorderly conduct is constitutionally infirm, and it is therefore suggested that the conviction for obstructing was entirely proper.

CONCLUSION

No substantial federal question is presented by this appeal. Appellee respectfully move the Court to dismiss the appeal or, in the alternative, affirm the decision of the Pennsylvania Supreme Court.

DATED: July 28, 1980.

Respectfully submitted,

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ENDNOTES:

1. The appellant's argument (ii) also makes reference to the failure of the Pennsylvania Supreme Court to "look to the intent of the defendant", but instead concentrated "on whether or not the statute provided fair notice of what was proscribed behavior". Jurisdictional Statement, p. 28. It is obvious from a reading of the decision below, however, that considerable emphasis was placed on the actor's intent. See citation from 78 Dick. L. Rev. 15, 30 (1973), which is incorporated into the opinion below at ____ Pa. ____, ____, 414 A.2d 57-58. With respect to the issue of intent, it has been held,

> "The requirement of a specific intent to do a prohibited act may avoid the consequences to the accused which may otherwise render a vague or indefinite statute invalid.... The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Screws v. United States, 325 U.S. 91, 101-102, 65 S. Ct. 1031, 1035-1036, 89

L. Ed. 1495 (1945) (plurality opinion). Colautti v. Franklin, 429 U.S. 379, ____ n. 13, 99 S. Ct. 675, 683 n. 13, ____L. Ed. 2d ____, ____ n. 13 (1979).

2. The appellee is mindful of the appellant's reliance on a footnote to the Colten opinion. That note states

> Appellant attacks on overbreadth grounds other subsections of the disorderly conduct statute, such as those that prohibit the making of an "unreasonable noise" and the use of "abusive or obscene language". Ky. Rev. Stat. §437.016 (c) (Supp. 1968). But Colten was not convicted of violating these subsections and they are not properly before us in this case.

407 U.S. at 111 n.3, 92 S. Ct. at 1958 n. 3, 32 L. Ed. 2d at 591 n. 3.

3. Whoever wilfully makes or causes to be made any loud, boisterous and unseemly noise or disturbance to the annoyance of the peaceable residents near by, or near to any public highway, road, street, lane, alley, park, square, or common, whereby the public peace is broken or disturbed or the traveling public annoyed, is guilty of the offense of disorderly conduct.... Law of June 24, 1939, P.L. 872, §406, as amended March 23, 1970, P.L. ____, No. 84, §1.

4. 15 U.S.C.S. §1 et seq. (Lawyers Co-Op. 1975).